There are certain other points which I have considered. Paragraph 5 of Mr. Wilson's declaration in my opinion contains much truth — there is likelihood that, in the future having regard to the progress made in the field of medical research, more and more drugs and preparations are likely to be available to the physician and chemist and it is in the public interest — and this I think must be studied — that there should be as little chance of confusion as possible between one preparation and another. In time of stress and emergency, drugs and similar preparations are administered by practically untrained personnel and this I feel is a fact that should be taken into consideration when exercising my discretion.

Finally, reference to *Medowell's Application*[4] reminds me that I am in no obligation to proceed with an application where the matter calculated to deceive is *in dubio*.

I am certain of the honest intentions of the applicants, especially by the fact that they already have on the Register the Trade Mark "Leo", but I am not satisfied that they have proved to me — and the onus is on them to do so — that there would not be the likelihood of confusion if both of these marks were to be used upon similar goods.

It is well to explain more explicitly the term likely to cause confusion. It is not necessary to cause the customer to purchase one thing in mistake for another. In the words of Lord Justice Sarjant, the public will be equally deceived for all practical purposes if they merely identify or confuse the producers of 'A' with the products of 'B' whether they know the name of the producers of 'B' or not.

The words "LEOCILLIN" and "LEDERCILLIN" differ little in appearance, especially when shown in quite a small print, and phonetically they differ less still, and it is a common practise nowadays for producers to put upon the market a series of goods or type of goods under names bearing common prefixes or suffixes such as CIBA, CIBAZOL, CIBALGIN; CLINESTROL, CLINTTEST, CLINIPEN; CORTATE, CORTELIN, CORTIRON; CORTONE and innumerable others.

Although I can assume that Physicians and Chemists are members of a profession who would exercise great care in their profession, I cannot grant to them a greater infallibility in memory or a more than ordinary ability in calligraphy diction or eyesight. The use and dispensation of these drugs by persons in the Colony, not being so proficient in English as perhaps they may be later, is partly dependent upon these things.

I do not consider that the applicants have discharged the onus, which is on them of proving to me that the mark is one that should be registered.

By virtue then of section 23 (1) of the Ordinance, and by the discretion granted to me, I decide that the application should not proceed.

Application refused.

GUTHRIE & CO., LTD. v. BRITISH INDIA STEAM NAVIGATION CO., LTD. & ORS.

[O. C. J. (Whitton, J.) August 3, 1953]

[Singapore — Suit No. 1047 of 1951]

Carriage of Goods — Bill of lading — Negligence — Liability of owners of ship and of lighter — Procedure.

The plaintiffs were at all material times the owners of 18,983 sacks of 50 lbs. flour which was shipped to Singapore by the "Carpentaria" belonging to the first defendants under a bill of lading dated February 13, 1951. On March 14, 1951 the "Carpentaria" was leaving a Singapore Harbour Board wharf when it came into collision with a lighter which had been hired by the second defendants and which had been engaged in receiving part of the flour cargo from the "Carpenteria" for transfer to the godowns. In consequence of this collision the lighter was partly submerged and some portion of the flour it had taken on was affected by water. The plaintiffs sued for non-delivery of 942 sacks of the flour consigned to them.

Held: (1) the evidence did not disclose any negligence on the part of either of the defendants; (2) neither of the defendants were liable for any breach of contract or negligence or as bailees as they were protected by the terms of the bill of lading as the goods had left the ship; (3) once a trial has started with a plaintiff and two defendants as parties it must be treated as one entire case. It would therefore be wrong for the Court to give a decision for the plaintiff at the close of the case for the first defendants without hearing the case for the second defendants.

Cases referred to:—

(1) *Hummerstone v. Leary* (1921) 2 K.B. 664.

(2) *Chartered Bank of India v. British India Steam Navigation Co. Ltd.* (1909) A.C. 369.

(3) *Meyerstein v. Barber* (1866 — 1867) 2 C.P. 38.

(4) *Elder, Dempster & Co. Ltd. v. Paterson, Zochonis & Co. Ltd.* (1924) A.C. 522.

(5) *The Kite* (1933) P. 154 at p. 181.

(6) *Gilbert Stokes & Kerr Prop. Ltd. v. Dalgetty & Co. Ltd.* 81 Ll. List L.R. 337.

(7) *Waters Trading Co. v. Dalgetty & Co. Ltd.* (1951) 2 Ll. List L.R. 385.

(8) *Nyalchand Motichand & Co. v. A. S. Mohamed Mydin; V. Varusay Rawther* (1952) M.L.J. 190.

Other relevant cases cited in argument were: *Peterson v. Freebody* (1895) 2 Q.B. 294; *Budgett v. Binnington* (1891) 1 Q.B. 35; and *Staker v. Kidd* (1878) 3 Q.B. 223.

CLAIM for negligence, breach of contract and on bailment.

Dr. C. H. Withers-Payne and *T. E. Lloyd* for the plaintiffs.

F. R. N. H. Massey for the 1st defendants.

J. K. Gale and *M. Y. Maxwell* for the 2nd defendants.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Whitton, J. : — By a bill of lading dated 13th February 1951 issued in Sydney, Australia, it was acknowledged on behalf of the first defendants as owners of the ship "Carpentaria" that there had been shipped onto this vessel at Sydney in apparent good order and condition, 18,983 sacks of 50 lbs. each of "Blue Anchor" flour for carriage to the port of Singapore. The plaintiffs were at all material times the owners of these goods and the indorsees of the bill of lading, the property in the goods passing to them by reason of the indorsement. On 14th March at about 1700 hours the Carpentaria was leaving a Singapore Harbour Board wharf when it came into collision with a lighter, No. 2371, which had been hired by the second defendants, and which had been engaged in removing part of the flour cargo from the Carpentaria for transfer to godowns. In consequence of this collision the lighter was partly submerged and some portion of the flour it had taken on was affected by water. In the end the plaintiffs never received 942 sacks of the flour consigned to them, and because of this shortage they have instituted the present action. These facts which are not in dispute are clearly established by the evidence.

Before turning to deal with matters in issue it will be convenient to refer to a decision I gave in the course of the trial on a point of procedure, as the decision in question had a bearing on the evidence produced during the trial. At the close of the case for the first defendants Dr. Withers-Payne for the plaintiffs submitted that on the evidence before the Court the plaintiffs were entitled to judgment against the first defendants. After adjourning the matter for consideration I ruled that it would be wrong for the Court at that stage of the case to give a decision on this submission. In so doing I was mainly guided by the authority of *Hummerstone v. Leary*[1]. The principle there laid down, as I see it, is that once a trial has started with a plaintiff and two defendants as parties it must be treated as one entire case. A possible consequence of this is that one of the defendants in the course of putting his own case before the Court will adduce evidence which may have the incidental effect of strengthening or weakening the case of his co-defendant. In *Hummerstone v. Leary*[1] it was the plaintiff who suffered, in the first instance at all events, by non-observance of the principle, but the principle no doubt may also work in favour of one of two co-defendants, a view which appears to find support in a note under the title "Trial: no evidence against one defendant," which is to be found at the foot of page 240 of "*The Annual Practice*", 1953 Edition. In the present case I considered the first defendants might be prejudiced by a decision on the plaintiffs' submission before the evidence of the second defendants was adduced. On the same grounds I refused an application made by Dr. Withers-Payne immediately after I had given the ruling mentioned to withdraw the claim of the plaintiffs against the second defendants. I should perhaps add that at a later point in the trial Mr. Gale for the second defendants intimated in the course of his case that he did not wish to proceed with a counterclaim for negligence against the first defendants, but as he did this after calling his only witness who might have been in a position to give testimony establishing negligence on the part of the first defendants the principle affirmed in *Hummerstone v. Leary*[1] did not appear to arise in this instance.

I now come to consider the causes of the collision and whether negligence on the part of either of the defendants has been established. There is no doubt as to how the collision occurred: the lighter moved up to a position close to the wharf just vacated by the Carpentaria while the latter was still in the course of the manoeuvre of moving off, and before this manoeuvre was completed the stern of the Carpentaria swung inwards towards the wharf again with the consequence her propeller fouled the lighter. It is more difficult to determine why the collision occurred. It is, I think, plain that there was nothing unusual about the nature of the Carpentaria's manoeuvre. Mr. Hutton, a Singapore Harbour Board berthing assistant, whose evidence I see no reason to suspect of bias, said of the Carpentaria "she was executing a normal manoeuvre". Mr. Hutton, also, it is true, said "there is a possibility in a manoeuvre like the Carpentaria's of the stern to swing back, but it doesn't often happen", whereas Captain Earl, the master of the Carpentaria, said that to his knowledge it was a common occurrence for the stern to move towards the wharf when the bow is pulled away from the wharf. I do not think however, this discrepancy as to what usually happens is very material

— at least in considering the case of the first defendants — having regard to the fact Mr. Hutton agreed that the manoeuvre was a normal one, and said nothing suggesting the swing back of the stern was caused by negligent handling of the vessel. The important point is whether the master and the officers of the Carpentaria and the Pilot to the extent there was a duty of care on each took reasonable steps to satisfy himself the manoeuvre could safely be carried out before it was commenced. It seems to me there is no evidence from which lack of reasonable care on the part of any of these persons can be inferred. Mr. Hutton stated the lighters had been made fast in positions where they would be safe while the Carpentaria moved out. The Pilot, Mr. Sinclair, said he saw the lighters (there were two of them at the scene) moved after he had told the wharf manager to get them clear off the vessel so that they would not hinder her getting out. The second officer of the Carpentaria also gave evidence to the effect the lighters were in a safe position when his vessel moved off. I am prepared to accept the truth of all these statements. The truth of them is, I feel, supported by a general impression one gets that at the time everything on board the Carpentaria was being performed with due regularity. There was no reason when the manoeuvre started to apprehend the lighters would move into the position they did, and, had they not done so, no accident would have occurred. Again I see no ground for believing that after the danger arose there was any omission on the part of those aboard the Carpentaria to take reasonable steps. The danger signal "Not clear aft" appears to have been given promptly, and the evidence on the matter generally does not suggest any effective steps could have been taken at that stage to avoid the collision. Mr. Hutton said, "There was very little the Carpentaria could do to avoid the accident. She could stop her engines". Captain Earl's statement that on receiving the danger signal he gave the order for the engines to be stopped has not been questioned. In this connection it is noteworthy that the only answer, Teo Pong, the taikong gave under cross-examination to the question "What could the Carpentaria have possibly done to avoid your lighter?" was "Should not have swung back its stern so much." If my view of the matter is accepted, which is that the swing back of the stern on this occasion was an occurrence which was not an inevitable and indeed perhaps not a very common (to the degree it happened in this instance anyhow) feature of the manoeuvre, but one which nevertheless, does not indicate in itself careless or faulty navigation of the vessel, it must be conceded, I think, the fact the swing back occurred does not justify any inference of negligence being drawn. In view of the considerations I have mentioned I find that the collision was not due to any negligence on the part of the first defendants, their servants or agents concerned with the navigation of the Carpentaria. We come then to the issue of negligence in relation to the second defendants. I am satisfied, and find as a fact, the collision would not have occurred had the lighters remained in the position they were at the time the Carpentaria moved off from the wharf, this position being under the stern of the Tomar, a ship that had been berthed stern to stern with the Carpentaria. There is a conflict of evidence as to whether, as Teo Pong the "taikong" says, the lighter 2371 was secured to the wharf at the moment of impact or whether it was, as alleged by Higgins, the second officer of the Carpentaria, adrift and coming towards the stern of the Carpentaria at that moment, an allegation which is corroborated by Mr. Hutton, who went so far as to say that had the lighters even after changing position remained alongside the wharf, instead of drifting, the collision would not have happened. I consider the evidence of Higgins and Hutton the more reliable on this point, but even if accepted it does not to my mind establish negligence on part of the "taikong", as I have no doubt he was drifting not from choice or through carelessness in attending to his ropes, but either through inability against an adverse tide, which it is clear from the evidence at the time existed, to secure his lighter to the wharf or to lack of adequate control of the ropes when suddenly confronted with a crisis. To my mind the negligence of the "taikong", if there was negligence on his part, was in moving at all into a potentially dangerous area. Teo Pong stated he moved from his position under the Tomar towards the wharf because, firstly, a European officer on the Tomar shouted to him and signalled to him the Tomar was about to move, and secondly because a wharfinger, whom he identified as the witness Nair, told him in Malay to move his lighter away from the Tomar. I accept this evidence of Teo Pong. It was definitely established the Tomar was then about to sail, and furthermore Mr. Hutton said he believed he had heard the second officer of the Tomar tell the lighterman to get clear of his propeller. The witness Nair denied giving any instructions to the lighter at the time in question, but I was not favourably impressed by his demeanour, and I do not believe his denial. The probabilities of the veracity of Teo Pong on this matter are strengthened by the circumstance, to which I have already referred, that the prevailing tide made the movement towards the vacated wharf an arduous one, and I see no reason to think the lighterman moved of their own choice. The issue is, then, was Teo Pong negligent in moving up towards the vacated position of the wharf in the circumstances he did. It is in his favour that he did so after warning

from the officer of the Tomar and in compliance with the instruction of a Harbour Board official. It is against him that he admits he did not see the Carpentaria's stern approaching him until after impact occurred, but in this connection it must be borne in mind that the effort of getting the lighter to the wharf clearly needed concentration both mental and physical on the task in hand. There is, however, a significant piece of evidence which to my mind must bring the scales down in favour of the "taikong". Mr. Hutton said in relation to his experience of Singapore Harbour "I have seen — about three times in three years — the stern of ships swinging back on the wharf". I think it may be correctly assumed in view of this that such swinging back is not a common occurrence. Can it be said then that Teo Pong, while acting in a moment of hazard and in compliance with the instructions of a Harbour Board official, in not anticipating the possibility of the stern of the Carpentaria swinging in towards the wharf to the extent it did was failing to exercise reasonable care? In the light of Mr. Hutton's statement just quoted it was clearly an eventuality not to be ordinarily anticipated by a taikong, and in my opinion there are not adequate grounds for holding there was negligence on the part of Teo Pong.

Before proceeding to consider whether either of the defendants can be liable in the absence of negligence I should say that I have no hesitation in holding, in spite of a lack of any positive testimony on the point from the first defendants, that the flour subsequently damaged was placed on lighter 2371 in good condition. Teo Pong, the taikong, stated the bags appeared to be in good condition when he received them, and in view of what he says it seems to me that in the absence of any direct or circumstantial evidence to the contrary, it would be fanciful to entertain any doubts on this point. Now as far as the first defendants are concerned it seems to me that, if the claim is to succeed, the only grounds on which it can succeed are either breach of contract or negligence. I have dealt with the question of negligence. So far as contractual liability is concerned we have the relevant terms of the contract set out in the bill of lading. The view has been put forward on behalf of the plaintiffs that at the time of the collision the contract had already been performed, and that, therefore, it had no further application. I do not think that view is tenable. The contract must surely remain unperformed as long as there remain to be fulfilled any obligations created by it, and it can scarcely be maintained that the first defendants had carried out all their obligations when they had effected physical transfer of the flour to the lighter. This opinion on the matter can, I think, be amply supported by reference to the case of the *Chartered Bank of India v. British India Steam Navigation Co. Ltd.*[2] on which, perhaps not surprisingly, the first defendants strongly relies. "Now it may be conceded", said Lord Macnaghton in the course of his judgment in that case, "that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed under the absolute dominion and control of the consignees". If further authority is required on the duration of a bill of lading a very definite statement will be found in the judgment of Erle, C.J. in *Meyerstein v. Barber*[3] at page 49: "If it were established that a bill of lading, — one of the most frequent securities for advances amongst mercantile men, — becomes exhausted and extinguished and ceases to be a security when the ship has reached her destination and the goods which it represents have been landed and warehoused, what a wide door would be opened for fraud!" The significance of this aspect of the present case is, of course, that if the bill of lading was not yet exhausted at the time of the collision it confers on the first defendants complete protection, as reference to Clauses 1, 10 and 24 will show, from the moment the goods left the Carpentaria, whereas if the bill of lading was already spent at this juncture any possible liability arising out of negligence could not be avoided under the terms of that document. A good deal was said in the course of the case about the relative meanings of the terms "delivery" and "discharge", but I think it will suffice at this juncture to say with reference to Clause 24 of the Bill of Lading the phrase "discharge from the ship" can, in my opinion, only mean the physical removal of the goods from the vessel. In view of the considerations I have mentioned I think the claim against the first defendants must fail. It is however, necessary, to consider the point whether if I am wrong in holding there was no negligence on the part of the lighter the second defendants can nevertheless avoid liability in negligence under the bill of lading — in short whether they are protected by it. In view of a number of authorities on this matter quoted during the case I have reached the conclusion the second defendants are protected by the bill of lading. It is desirable, however, to make some references to these authorities. In the *Elder, Dempster case*[4], decided by the House of Lords in 1924 it was held that shipowners whose vessel had been chartered by a shipping company were entitled to the protection of the bill of lading although they were not directly parties to the contract. From that case, as Langton, J. observed in *"The Kite"*[5] one gets two possible lines — one the line of agency, the other the line of bailment. Lord Cave

in the course of his judgment (at p. 534) said: "It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton, L.J. says) on behalf of and as agents of the charterers and so can claim the same protection as their principals. Two recent cases on the subject, the decisions in which have the weight of persuasive authority in this Court, have come before the Supreme Court of New South Wales. They are *Gilbert Stokes & Kerr Prop. Ltd. v. Dalgetty & Co. Ltd.*[6] decided in 1948 and *Waters Trading Company v. Dalgetty & Co. Ltd.*[7]. I should say at this point that I do not think there is anything in the facts of our present case which would render fallacious the application of the lines of reasoning followed in the authorities to which I have referred. In the first of the Australian cases it was held that the defendants, who were stevedores employed as independent contractors, were in possession of the plaintiff's goods as bailees on terms which included the exceptions contained in the bill of lading. In the second case, which in its facts was remarkably similar to the present case, it was held that the contract evidenced by the bill of lading remained in force until the delivery of the goods to the plaintiff consignees; that until such delivery the defendants, though independent contractors, were servants or agents of the shipowners in carrying out the contract, and that, as such, they were entitled to the same protection or immunity as was given to the shipowners or their agents by the bill of lading. So the weight of authority, whether one follows the line of agency or the line of bailment, appears to lead to the same result, that the second defendants are protected by the bill of lading.

I should, perhaps, however, commit myself to a definite opinion on this point of agency or bailment since the plaintiffs have pleaded that the second defendants as bailees for the plaintiffs have failed to deliver the 942 sacks of flour, and in his final address for the plaintiffs Mr. Lloyd strongly urged on me that the second defendants held as bailees. In my view the second defendants were clearly the agents of the first defendants. It is clear from the evidence that the second defendants throughout, both before and after the accident, were acting on the orders of the first defendants. On the other hand I do not see how the second defendants were bailees of the plaintiffs. If there was a bailment — a delivery of personal chattels in trust — then I think the second defendants were bailees of the first defendants and the extent of their bailment was to place safely the goods in the Harbour Board godowns. Teo Pong the lighterman said, "I had received instructions the flour was to be discharged into godown 10". There is no suggestion there was any duty on the second defendants at any time to see that the flour was safely delivered into the hands of the plaintiffs or any other consignee.

In conclusion I would say that I do not think the findings I have reached are affected by *Nyalchand Motichand & Co. v. A. S. Mohamed Mydin; V. Varusay Rawther*[8]. Even if the charterer of a lighter can be held to be in the same position as a lighter owner as far as liability is concerned it seems to me that there is nothing invalid in a lighter-owner limiting his liability by contract, and in this case, if the conclusions I have reached are right, the second defendants are protected as adequately as if they had personally entered into a contract with the plaintiffs under the terms of which they were excluded from liability from loss such as occurred in this case.

The claim of the plaintiffs against both the first and the second defendants is dismissed. The counter-claim of the second defendants against the first defendants, already withdrawn during the trial, is formally dismissed. As requested by counsel I reserve for argument the question of costs.

Claim dismissed.

LOW HONG alias LIEW AH HENG v. TAN HOR CHOON.

[O. C. J. (Good, J.) September 22, 1953]

[K.L. — Civil Suit No. 103 of 1940]

Bankruptcy — Annulment during occupation period — Whether annulment holds good if not substituted by an order of an appropriate Court under section 7 of the Japanese Judgments and Civil Proceedings Ordinance, 1946 — Whether annulment of an adjudication order under section 98(i) of the Bankruptcy Enactment (F.M.S. Cap. 55) disturbs the effects of a receiving order under section 9(i).

Judgment was given in favour of the plaintiff in 1941. Later in 1941, the decree not having been executed, a receiving order and adjudication order in bankruptcy were made against the defendant. The adjudication order was annulled in 1943. In 1953, upon the application of the plaintiff, notice under section 264 of the Civil Procedure Code was issued to the defendant to show cause why the decree should not be executed. In seeking to show cause, the defendant submitted, inter alia, (1) that the plaintiff could not rely upon the annulment of the adjudication order to avoid the consequences of section 9(i), because no order of an appropriate Court had been substituted for the order of annulment in accordance with the provisions of section 7 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, and (2) that an annulment under section 98(i) of the Bankruptcy Enactment is only an annulment of the adjudication order and does not disturb the effects of a receiving order under section 9(i), which would preclude the plaintiff from proceeding to execution except with the leave of the Court granted in that behalf under that sub-section.